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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1975
No. 75-50

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al., *Appellants*,

v.

MOE, et al., *Appellees*.

October Term, 1974
No. 74-1656

JOHN C. MOE, et al., *Appellants*,

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF POSITION OF THE STATE OF MONTANA

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I.
INTEREST OF AMICUS CURIAE

There are twenty-two Indian reservations within the State of Washington.[1] These reservations vary

[1]Department of Commerce, *Federal and State Indian Reservations and Indian Trust Areas*, p. 531-577 (G.P.O. 1974)

greatly both in size and in the number of Indians living thereon.

At one end of the spectrum is the Yakima Reservation, consisting of approximately 1.1 million acres of tribally owned and allotted land.[2] There are approximately 5,000 enrolled members of the Yakima Nation.[3] At the other end of the spectrum is the Puyallup Reservation, encompassing 33 acres of land,[4] most of which is used as an Indian cemetery and as a location for a cigarette shop. There are approximately 171 Indians residing on or near the reservation.[5] (While the original reservation consisted of 18,000 acres, and has not been terminated, *U. S. v. Washington,* 496 F.2d 620 (C.A. 9, 1974) all but the 33 acres have been alienated to non-Indians.)

Both of these reservations, however, share with each other, and with most of the twenty other reservations, a common characteristic: they are located in close proximity to major population centers and major highways. Further, in the case of the two largest reservations, the Yakima Reservation and the Colville Reservation, the exterior boundaries of the reservation encompass sizable cities, with predominantly non-Indian populations.

Thus, it is hardly surprising that there are approximately 65 Indian smoke shops located on 17 different reservations in the state of Washington. The present annual loss from these smoke shops in

[2]Ibid, p. 575
[3]Ibid, p. 576
[4]Ibid, p. 556
[5]Ibid, p. 557

cigarette tax and retail sales tax is approximately $8 million.

As would be expected, the state of Washington is in litigation with most of the Indian tribes in the state on the question of the status of the tribe and its members under the cigarette tax, the retail sales tax, and other state excise taxes. A list of pending cases was attached as Appendix B to the Brief For The States of Washington and Idaho as Amici Curiae in Support of Jurisdictional Statements. The disposition of the two Montana cases at bar by this Court will no doubt have a significant impact upon all of these pending cases.

These tribes and the reservations they occupy generally fall into two categories, so far as the application of Public Law 83-280 is concerned. Approximately half of them fall into the category exemplified by the Colville Tribe on the Colville Reservation, which was involved in *Tonasket v. State,* 79 Wn.2d 607, 488 P.2d 281 (1971), judgment vacated, 411 US 451 (1973). The tribes in this category have requested that the state assume the full extent of jurisdiction permissible under PL 83-280, and the state has done so.

The other half of the tribes have not requested that the state assume such jurisdiction, and, pursuant to RCW 37.12.010, the state has assumed a relatively limited jurisdiction. This limited jurisdiction, as it applies to Indians on tribal or allotted lands held in trust or restricted as to alienation, covers

only eight specified subject matters. These eight enumerated subject matters are similar to the subject matters with respect to which jurisdiction was assumed over the Flathead Reservation in the case at bar. Thus, the Washington reservations in this second category are similar to the Flathead Reservation, so far as the application of PL 83-280 is concerned.[6]

The Washington retail sales tax and the Washington Cigarette Tax are similar to the Montana cigarette tax, in that the legal incidence of the tax is on the retail buyer, with the seller acting as a collecting agent.[7]

II.

ARGUMENT IN SUPPORT OF POSITION OF THE STATE OF MONTANA

At the outset, as indicated in the Brief For the States of Washington and Idaho As Amici Curiae In Support of Jurisdictional Statements, pp. 9-19,

[6]RCW 37.12.010 provides as follows:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 3, Laws of 1963 had not been enacted.

Neither the subject matters involved in the Montana assumption of jurisdiction nor those involved in the assumption of jurisdiction by Washington with respect to the second category of reservations expressly cover the subject matter of taxation.

[7]In Chapter 22, Laws of 1975, 1st Ex. Sess., the Washington State Legislature amended its cigarette tax statutes in two important respects. First, it eliminated the two-carton exemption contained in RCW 82.24.260 (section 7, chapter 157, Laws of 1972, ex. sess.), which was one of the provisions which was relied upon by this Court in remanding *Tonasket v. State* back to the Washington State Supreme Court. (411 US 451). RCW 82.24.260 was further amended to provide that, with certain exceptions, the state cigarette tax is a consumer-type tax, similar to the Montana cigarette tax involved in the case at bar, when the cigarettes being sold by the retailer are unstamped.

the State of Washington agrees with all the arguments advanced by the State of Montana in support of its position in the two cases at bar. In the most general sense, the cases at bar involve the necessity of determining the nature and extent of states' jurisdiction to impose state taxes upon Indians engaged in various activities from locations on trust or restricted land within the exterior boundaries of an established Indian reservation. While the State of Washington is fully supportive of Montana in the two cases at bar, the focus of this Brief will be on the issue of state power to impose state excise tax upon Indians who engage in commercial activities with non-Indians from business locations within Indian reservations. Rather than simply restating the underlying arguments, the object of this Brief will be to consider the question of the scope of any Indian immunity from state taxation stemming from the dotcrines of Indian sovereignty, federal preemption, and implied governmental immunity.

In short, we believe such a consideration strongly supports the proposition that in circumstances such as those involved with Montana and the Flathead Reservation as well as with the State of Washington and various of the Indian reservations located within it, there is no valid basis for denying states' jurisdiction to impose excise taxes upon Indians engaged in commercial activities with non-Indians at business locations within the exterior boundaries of an Indian reservation.

A. Do The States Possess Residual Jurisdiction Over Indians On Indian Reservations?

It is the basic position of Indian counsel that the states have no residual jurisdiction over Indians within the exterior boundaries of an Indian reservation. This issue involves the fundamental relationship between Indians as residents and citizens of the states in which they reside and Indian reservations as part of the specific territory of the states. There are divergent lines of United States Supreme Court decisions dealing with this question. It however lies at the heart of state tax jurisdiction over reservation Indians in areas not preempted by Congress. Imposition of state cigarette taxes and other excises on Indians conducting business with non-Indians within the exterior boundaries of an Indian reservation on trust of restricted lands depends on the inherent jurisdiction of the sovereign states tested against federal preemption, Indian treaties and Indian sovereignty.

This question may be broken down for answer into two subsidiary questions, namely: (1) Are reservations within the territorial limits and jurisdiction of the states; and (2) If they are, to what extent do the doctrines of Indian sovereignty and federal preemption (federal legislation including treaties and enabling act restrictions) remove the reservations from state jurisdiction?

In attempting to give some definitive answer to this question, it is important to note that the decisions of this Court have taken divergent viewpoints on this issue. Premised on the early cases of *Worcester v. Georgia* (US), 31 U.S. 515, 8 L.Ed. 483 (1832); *Kansas Indians (Blue Jacket v. Johnson)* (US), 72 U.S. 737, 18 L.Ed. 667 (1866); *New York Indians (Fellows v. Denniston)* (US) 72 U.S. 761, 18 L.Ed. 708 (1868) and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973) the argument is made on behalf of the Indians that the states have no jurisdiction over Indian reservations except as expressly authorized by Congress. This argument is best expressed in terms of geography, that is, an Indian reservation is "off limits" to state jurisdiction.

In applying the principles of *Worcester v. Georgia, supra, Kansas Indians, supra,* and *New York Indians, supra,* in cases such as *McClanahan,* this Court did not note the differences between the treaties involved in those early cases and in later cases such as *McClanahan.* In *Worcester* the pro-

visions of several treaties between the United States and the Cherokee Indian Nation expressly denied any jurisdiction in Georgia over the territory of the Indian Nation. In a very real and express sense, the Cherokee lands were not a part of the State of Georgia. The original treaty (the treaty of Hopewell formed on November 28, 1785) agreed upon "the boundary line between the Cherokees and citizens of the United States." Subsequent treaties carried the same stipulation. These treaties were entered into as a result of hostilities where sections of territory were procured and boundaries agreed upon between the Cherokee Nation and the United States. The purpose of the Georgia Act declared unconstitutional was to add Cherokee territory to the boundaries of the State of Georgia. As indicated by this Court at 31 U.S. 582:

> "By the act of cession, Georgia designated a certain line as the limit of that cession, and this line, unless subsequently altered, with the assent of the parties interested, must be considered as the boundary of the State of Georgia."

Thus, a non-Indian going on the reservation was not subject to state jurisdiction. The same was true in reference to the treaties involving the Kansas Indians and the New York Indians. Thus, with due respect to the decisions of this Court, it is not so much that the principles of *Worcester v. Georgia* have been changed by subsequent cases. Rather, what has been changed are the rights guaranteed to the Indians by federal legislation of which treaties are

only a part. It is equally interesting to note that even in these early cases the court was not unaware of the problems that might result when the Indian reservation communities became intermingled with lands and communities over which the Indians had no jurisdiction. In fact, the treaties which set apart lands for the Indians at a place distant to the white man's settlements were in specific response to these problems.

In circumstances where "Indian country" was not excluded by treaty from the territory of the states, the cases have generally held that "Indian country" is not "off limits" to state jurisdiction. *Kake v. Egan*, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562 (1962); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L.Ed. 1091, 50 S.Ct. 455 (1930); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307 (1946); *United States v. McGowan*, 302 U.S. 535, 82 L.Ed. 410, 58 S.Ct. 286 (1938); and *Williams v. Lee*, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959).

Thus, in *State of New York ex rel. Ray v. Martin, supra*, this Court noted:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. at 499, quoted with approval in *Kake v. Egan*, 369 U.S. at 74.)

Again, as stated in *United States v. McGowan, supra*:

> "Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the Federal enactments." (302 U.S. 539)

In *Kake v. Egan*, this Court discarded the general notion expressed in *Worcester v. Georgia* and *Kansas Indians* that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate. It there noted:

> "* * * that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. * * *" (369 U.S. at 72-73)

If this were not true, cases such as *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882), and *Draper v. United States*, 164 U.S. 240, 41 L.Ed 419, 17 S.Ct. 107 (1896) which upheld state jurisdiction would have been erroneously decided.

In sum, Indian reservations are not "off limits" in a territorial sense unless they are excluded from state boundaries by state enabling legislation such as before this Court in *Worcester v. Georgia*. (See for example, *Langford v. Monteith*, 102 U.S. 145, 26 L.Ed. 53 (1880).)

The State of Washington urges that the referred to cases indicating that Indian territory is part of a state for jurisdictional purposes point out the proper direction and focus for inquiry. The states do have *territorial* (geographical) jurisdiction. The

sole question is whether the states have *subject matter* jurisdiction. This depends on the limitations imposed by federal law including treaties and state enabling legislation and what remains of notions of Indian sovereignty. These cases further indicate that where jurisdiction has not been preempted by the Congress, the states do in fact have residual jurisdiction. Thus, jurisdiction not exercised by the federal government is not in the Indian tribes as sovereign nations but rather in the states as sovereign states. This principle has been modified, however, by other notions of Indian sovereignty.

One of the most troublesome problems confronting the states in application of their excise taxes to commercial activites of Indians on Indian reservations is what has been referred to as "platonic notions" of Indian sovereignty. Broadly speaking, the question is, what law governs: tribal law or self-government or state law, in the absence of controlling federal treaties or federal legislation? In Cohen's treatise on federal Indian law, the question of the scope of tribal self-government is discussed. F. S. Cohen, Handbook of Federal Indian Law, Chapter 7 (1971). Cohen there makes the claim based upon the principles announced in *Worcester v. Georgia, supra*, that those powers which are lawfully vested in an Indian tribe are not in general delegated powers granted by express acts of Congress, but are rather inherent powers of a limited sovereignty which has never been extinguished. This, of course, is the basic

claim of Indians and Indian tribal organizations. This line of reasoning would support the proposition that Indian tribal organizations within the exterior boundaries of an Indian reservation have jurisdiction not denied them by Congress by affirmative federal legislation.

Consistent with the principle that Indian reservations are within the territorial jurisdiction of the state unless expressly excluded therefrom by metes and bounds description or other language of like effect, the courts have uniformly upheld state jurisdiction over non-Indians dealing with non-Indians within the exterior boundaries of a reservation.

As stated in Cohen's Handbook of Federal Indian Law, *supra*, at page 121:

> "The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not a federal concern."

Inconsistent with this principle, even after Indians were made full-fledged citizens and residents of the states and Indian reservations were broken up as a result of allotment acts, the courts have denied state jurisdiction in some cases where transactions involved Indians where the doctrine of federal preemption would appear to have no application because of the absence of any controlling treaty or federal statute provision. On the other hand, in some cases where transactions involved Indians the court has granted jurisdiction. What were the controlling

considerations in these two types of cases is not clear from the reading of the decisions. It is difficult to ascertain to what extent, if any, the states have been denied state jurisdiction on the basis of the doctrine of Indian sovereignty rather than the application of the doctrine of federal preemption including the concomitant principle of implied governmental immunity. To the extent jurisdiction is denied on the basis of federal preemption or government immunity, there is a statutory and case law framework which can be applied to other circumstances and cases. However, there appear to be interwoven into the decisions denying state jurisdiction concepts of Indian sovereignty. Examples of this are *Williams v. Lee*, *supra*, and *McClanahan*, *supra*. In *Williams v. Lee*, *supra*, this Court, in commenting on the principles enunciated in *Worcester v. Georgia*, *supra*, stated:

> "* * * Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. * * * Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. * * *" (358 U.S. at 219-220)

Since in *Williams v. Lee* there was (i) no absence of territorial jurisdiction such as that involved in *Worcester v. Georgia*, and (ii) no controlling fed-

eral statute that preempted jurisdiction, *Williams v. Lee* must of necessity be an implied immunity case stemming from application of the doctrine of Indian sovereignty.

The *McClanahan* case is difficult to analyze in reference to the question of Indian sovereignty. In *McClanahan, supra*, this Court initially noted that:

> "This case requires us once again to reconcile the plenary powers of the State over residents within their bodies with the semi-autonomous status of Indians living on tribal reservations. * * *" (411 U.S. 165)

In *McClanahan* this Court, after discussing the concept of Indian sovereignty stemming from *Worcester v. Georgia*, appropriately noted, in footnote 7 at 411 U.S. at 172, that the source of federal authority over Indian matters is the power the federal government derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. After stating that a bar to state jurisdiction rested on federal preemption rather than the idea of inherent Indian sovereignty, it stated:

> "The modern cases thus tend to avoid reliance on Platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."

While in *McClanahan* this Court thus seemingly rejected Indian sovereignty as a controlling principle and sought to rely instead on relevant treaties and federal statutes, it further noted:

> "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."

> * * * * *
>
> "When the relevant treaties and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by atempting to tax appellant." (411 U.S. 172, 173)

It is further interesting to note that this Court in *McClanahan* rejected the test in *Williams v. Lee, supra*, when applied to an Indian. Arizona took the position in *McClanahan* that imposition of its income tax on McClanahan did not interfere with reservation self-government. This Court noted in reference to this argument that:

> "In fact, we are far from convinced that when a state imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination. But even if the state's premise is accepted we reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians." (411 U.S. at 179)

In the *McClanahan* case, this Court seemed to reject application of this principle to Indians by noting that McClanahan's "* * * activity is totally within the sphere which the relevant treaties and statutes leave for the federal government and for the Indians themselves."

The only apparent justification for this statement is the assumption that the Navajo reservation treaty provisions are not modified by subsequent federal legislation and that these treaty provisions place the Navajo reservation beyond state jurisdiction as pertains to Indians.

The question thus posed is whether *McClanahan* is expressing a line of decisions beginning with *Worcester v. Georgia* based on principles of Indian sovereignty stemming from treaty rights which is inconsistent with cases such as *Surplus Trading Co. v. Cook, supra; State of New York ex rel. Ray v. Martin, supra; United States v. McGowan, supra;* and *Kake v. Egan, supra.*

While it may be simple enough to state that Arizona lacked tax jurisdiction as pertains to Indians on the Navajo reservation, it leaves unanswered the jurisdiction of Arizona to administer and enforce those programs to which Indians are entitled to under due process and equal protection requirements. For example, does Arizona lack jurisdiction to enforce its statutes where an Indian erroneously or by fraud obtains financial assistance from Arizona such as Aid to Dependent Children? Obviously, it would be impossible to administer a program where Indians are concerned and to which benefits they are entitled as residents and citizens of the state without jurisdiction over the Indians to carry out the purposes of the program. Furthermore, if Arizona does not in fact have jurisdiction over Indians on the

Navajo reservation is there any basis in law and fact in assuming that Arizona has to assume any responsibility? Can Arizona in spite of the citizenship and residency of Navajo Indians and in spite of due process and equal protection requirements of the federal constitution deny the Navajo Indians the benefits conferred by Arizona on its own citizens and residents? In this connection it seems that the burdens should follow the benefits. Privileges and immunities of residence and citizenship ought to carry the duties and obligations of that residency and citizenship. This Court has never really addressed itself to this problem but rather has assumed that the benefits of all state laws including various services are not applicable to Indians. In *McClanahan* this Court said that the Navajo Indians received some state services. The answer to that is that they receive all state services the same as any other resident or citizen. The only thing exclusive about the Navajo Tribe is the exercise of self-government comparable to local self-government granted municipalities, counties, etc.

The significance of the *McClanahan* case was considered by this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L.Ed.2d 114, 93 S.Ct. 1267 (1973). This Court in *Mescalero* rejected the broad assertion that the federal government has exclusive jurisdiction over the tribe for all purposes whether the tribal enterprise is located on or off tribal land. In so doing, it significantly noted that any such generalization

"* * * has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See *McClanahan v State Tax Comimssion of Arizona*, 411 US 164, 36 L Ed 2d 129, 93 S Ct 1257, *Organized Village of Kake v Egan*, 369 US 60. 71-73, 7 L Ed 2d 573, 82 S Ct 562 (1962). The upshot has been the repeated statements of this Court to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *Organized Village of Kake, supra*, at 75, 7 L Ed 2d 573; *Williams v Lee*, 358 US 217, 3 L Ed 2d 251, 79 S Ct 269 (1959); *New York ex rel. Ray v Martin*, 326 US 496, 499, 90 L Ed 261, 66 S Ct 307 (1946); *Draper v United States*, 164 US 240, 41 L Ed 419, 17 S Ct 107 (1896). Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v State Tax Commission of Arizona, supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." (411 U.S. at 148)

If the above interpretation of *McClanahan* holding is correct, it would indicate that jurisdiction was denied on the basis that under the Navajo treaty the reservation was set aside for the use and occupation of the Navajo Tribe of Indians and that " 'no persons except those herein authorized to do, and

except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.' 15 Stat. 667, 668 (1868)." (411 U.S. at 174)

Since this Court found no specific treaty or statute which granted tax immunity apart from that implied from the treaties setting he Navajo reservaion apart for the exclusive jurisdiction of the Indians, it is fair to conclude that the *McClanahan* reservation source income tax exemptions stem solely from inherent sovereignty this Court found by application of the treaty provisions peculiar to the traditional notion of Navajo Indian sovereignty. In this connection, this Court did not consider the effect, if any, of the general allotment act on Arizona's jurisdiction within the exterior boundaries of the Navajo Indian Reservation nor the effect of conferring citizenship on McClanahan.

Thus, in spite of the language in *McClanahan* and the test asserted to be applicable in *Mescalero*, it seems that the question concerning inherent Indian sovereignty must still be faced. This statement is based upon the proposition that this has implied immunity even though it was not an immunity granted by any federal legislation or express treaty.

In this connection *Kennerly v. Dist. Court of Montana*, 440 U.S. 432, 27 L. Ed.2d 507, 91 S.Ct.

480 (1971) bears consideration. In the *Kennerly* case this Court invalidated tribal legislation which authorized state civil court jurisdiction. *Kennerly* seems to suggest that tribal sovereignty is somehow bestowed by the Congress and not something inherently reserved to the Indian tribes. It is further interesting to consider the *Kennerly* case in light of the fact that federal jurisdiction over Indians has repeatedly been said to stem from its power to regulate commerce with Indian tribes and to make treaties. In other words, is Indian sovereignty something granted by the federal government by treaty or Indian trade regulation rather than an exercise of residual powers in the tribes?

In light of the *Kennerly* case and the controlling principles enunciated by this Court in *McClanahan*, *supra*, and *Mescalero*, *supra*, it appears that Indian sovereignty or Indian right to self-government must be tested against federal legislation including treaties in terms of what is taken from the states by Congress and lodged either in the federal government or the Indian tribes, rather than to proceed on the assumption that Indian tribes are sovereign within the exterior boundaries of an Indian reservation except to the extent that sovereignty is impinged upon by express federal legislation.

In the case at bar, the court below upheld Montana's cigarette excise tax to the extent it required a member of the tribe (Wheeler) to collect a cigarette use tax on sales to non-Indian consumers. The tribal

member conducted cigarette retail activities on trust land leased from the tribe within the exterior boundaries of the Flathead Reservation. In arriving at this result the court construed *McClanahan* as prohibiting Montana from subjecting Wheeler to the cigarette tax licensing requirements or collecting a use tax from Indian consumers. In upholding use tax collection by Wheeler from non-Indians the court framed the issue as

> "* * * does the established principle of federal pre-emption in taxation and regulations of Indian trading extend to the sale of cigarettes to non-Indians under this factual situation?"

In resolving this issue, the court distinguished *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 14 L.Ed.2d 165, 855 S.Ct. 1242 (1962), and noted that Indian country is within the general jurisdiction of the state. It found that the *subject matter* (use tax collection responsibility on sales to non-Indians) did not interfere with any expressed or known federal policy of protecting Indians on Indian reservations (federal preemption, implied governmental immunity or the tribe's right to self-government). It then concluded:

> "* * * Under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians."

It is submitted that the Montana decision is proper as pertains to trade with non-Indians.

Important for our purposes here is the fact that the Montana District Court upheld state residual jurisdiction in the absence of conflicting federal legislation or policy. Also, the Montana District Court appropriately noted that the issue involving state taxation of activities by Indians with non-Indians is still an open question under United States Supreme Court decisions.

B. **The Indians and Indian Tribal Organizations Have the Burden of Establishing That a Specific Federal Statute or Treaty Provision or Constitutional Provision (State or Federal) Entitles Them to the Exemptions From State Excise Taxes Which They Claim.**

As in the residual jurisdiction area, there is here involved conflicting authority. One line of authority clearly indicates that the Indians are no different than anyone else when claiming exemption from state taxation. To establish this principle we need go no further than the following statement in *Mescalero*:

> "* * * absent clear statutory guidance, courts ordinarily will not imply tax exemptions * * *.
>
> "'This Court has repeatedly said that tax exemptions are not granted by implication * * *. It has applied that rule to taxing acts affecting Indians as to all others. * * * If Congress intends to prevent the State of Oklahoma from levying a nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences.' *Oklahoma Tax Comm'n v United States, supra*, 319 US, at 606-607, 87 L Ed 1612

(1943). See *Squire v Capoeman, supra*, 351 US, at 6, 100 L Ed 883. Absent a 'definitely expressed' exemption, an Indian's royalty income from Indian oil lands is subject to the federal income tax although the source of the income may be exempt from tax. *Choteau v Burnet*, 283 US 691, 696-697, 75 L Ed 1353, 51 S Ct 598 (1931). The Court has also held that a State, as well as the Federal Government, may tax an Indian's pro rata share of income from a tribe's restricted mineral resources. *Leahy v State Treasurer*, 297 US 420, 80 L Ed 771, 56 S Ct 507 (1936). Lessees of otherwise exempt Indian lands are also subject to state taxation. *Oklahoma Tax Comm'n v. Texas Co.*, 336 US 342, 93 L Ed 721, 69 S Ct 561 (1949).

* * * *

"* * * We therefore hold that the exemption in § 465 does not encompass nor bar the collection of New Mexico's nondiscriminatory Grass Receipts Tax and that the Tribe's ski resort is subject to that tax." (411 U.S. 156-158)

As otherwise stated in *McClanahan*:

> "It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed." (411 U.S. 176)

At this point it seems incumbent upon the Indians to point to specific federal statutes or treaty provisions or state enabling legislation which would exempt Indians from state taxation such as legislation, including enabling acts, which exempt Indian restricted or trust lands from property taxation. This rule of exemption from state taxation, however, must be construed with the language in the *McClanahan* case that (i) state laws generally are not applicable

to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply; and (ii) Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the states by act of Congress (411 U.S. 171).

It is extremely difficult to reconcile these different statements appearing in *McClanahan* and other Supreme Court decisions. Obviously, if the states do not have jurisdiction to tax Indians except as expressly conferred by Congress, the statements that tax exemptions must be expressed are not applicable to state taxation of Indians on Indian reservations.

Still, inasmuch as there is ample authority for the proposition that Indians are on no different footing than non-Indians pertaining to tax exemptions (granted *subject matter* jurisdiction), the states have ample basis to assert that Indians bear the burden of pointing to particular federal legislation or treaty provisions that confers the exemption. Neither general notions of Indian sovereignty, implied governmental immunity or federal preemption should control. This position is certainly compatible with the cases notwithstanding that immunity is implied in *McClanahan* from a series of considerations discussed by the court in the *McClanahan* case.

C. **Any Rights That the Indian Tribes Have Under the Treaties, Statutes and Executive Orders Creating the Reservation Are Subject to Change by Subsequent Federal Legislation.**

This is an important principle of constitutional law that the court completely neglected in its discussion of applicable principles in the *McClanahan* case.

In *Cherokee Tobacco v. United States*, 11 Wall. 616, 78 U.S. 227 (1871) this Court had before it the question of the application of the federal cigarette tax law on a reservation set aside for the Cherokee Nation of Indians. There was an apparent conflict between the provisions of Section 107 of the Internal Revenue Laws which imposed excise taxes within the exterior boundaries of the United States and the 10th Article of the Treaty of 1866 between the United States and the Cherokee Indian Nation. Article 10 provided that every Cherokee Indian was entitled to sell any merchandise or manufactured products free of any tax which "is now or may be levied by the United States on the quantity sold outside of the Indian territory." In disposing of this conflict, this Court first determined that the Cherokee Nation territory was part of the territory of the United States. Significantly, it noted the difficulties in application of the federal liquor and tobacco products excises if this were not the case.

In reference to the conflict between the Internal Revenue law as so construed and the Cherokee treaty provision the court held:

"It need hardly be said that a treaty cannot

change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principle of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (*Foster v. Neilson*, 2 Pet., 314) and an act of Congress may supersede a prior treaty. *Taylor v. Morton*, 2 Curt., 454; *The Clinton Bridge*, 1 Woolw., 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. *In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered.* If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

"Does the section thus construed deserve the severe strictures which have been applied to it? As before remarked, it extends the revenue laws over the Indian territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt. As regards those articles, only the same duties are exacted from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the

public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians? The frauds that might otherwise be perpetrated there by others, under the guise of Indian names and simulated Indian ownership, is also a consideration not to be overlooked." (78 U.S. at 229) (Text underscoring added.)

The same principle was applied by this Court in *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882) in which it was held that the State of Colorado had exclusive jurisdiction to try a white man for murder of another white man within the boundaries of the Ute Indian Reservation. This Court there held that the act of Congress of March 3, 1875 admitting Colorado into the Union superseded any inconsistent provisions in prior legislation including Indian treaties. This Court there noted:

"* * * Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *Case of the Kansas Indians*, 5 Wall., 737 (72 U.S., XVIII., 6672; *U. S. V. Ward* (*supra*)]. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the Treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States." (104 U.S. at 624)

Many of the states, of course, stand on the same footing as Colorado.

This Court in *Ex Parte Webb*, 225 U.S. 663 (1912) said:

> "Of course, an act of Congress may repeal a prior treaty as well as it may repeal a prior act. *The Cherokee Tobacco*, 11 Wall. 616; *Fong Yue Ting v. United States*, 149 U.S. 698, 720; *Ward v. Race Horse*, 163 U.S. 501, 511; *Draper v. United States*, 164 U.S. 240, 243." (225 U.S. at 683)

If the fundamental principle alluded to above is followed, the effect of subsequent federal legislation on Indian treaty rights and on a state's tax jurisdiction must be taken into consideration. This Court in *McClanahan* did not reconcile the jurisdiction Arizona acquired under the enabling act by its admission to the Union and the jurisdiction it may have lacked at the time that the Navajo treaty was made with the Navajo Indians. Furthermore, it did not take into consideration various Indian allotment acts which would make a checkerboard of an Indian reservation and thus preclude the application of the doctrine of exclusive Indian or federal jurisdiction within the confines of an established Indian reservation. How can it realistically be said that Indians or the federal government have exclusive jurisdiction within the exterior boundaries of an Indian reservation unless there is an express grant of power to the states when as a matter of substance this power has already been granted the states by the doctrine of state sovereignty as part of the admission of states

to the Union on an equal footing with other states? If this principle were not applicable, discussion of the doctrine of federal preemption as pertains to states' power is meaningless. The doctrine of preemption is only applicable where both the states and federal government have concurrent jurisdiction absent a preemption of jurisdiction by Congress.

Furthermore, the jurisdiction admittedly conferred upon the states over land within the exterior boundaries of a reservation not held by trust or restricted deed would be invalidated since this jurisdiction is not expressly conferred by any federal legislation. There is no federal law that says that property within the exterior boundaries of an Indian reservation when acquired by a non-Indian or an Indian free of any restrictions is subject to state tax jurisdiction. However, this is the result. This consequence flows solely from the removal of federal restrictions contained in federal statutes, including treaty provisions, and not as a result of any express grant of authority by the Congress to the states. As indicated in the *Mescalero* case the source of federal power over Indians is its power to make treaties with the Indians and to regulate commerce with the Indian tribes. This was a power granted to Congress by the people and the states and the powers not granted to the federal government are automatically reserved to the states.

In sum, we submit that unless there is some express federal law enacted by Congress under its

treaty powers or under its power to regulate commerce with Indian nations which precludes state taxation, the states have jurisdiction to impose general excise taxes on Indians on an Indian reservation. This does not mean, of course, that this Court may not construe an enabling act or an act of Congress such as the Buck Act, 4 USC § 104, et seq., or the Indian Traders Act, 25 USC §§ 261-264, or Indian treaties which have not been modified by subsequent legislation, as constituting a source of Indian tax exemption. Obviously, this Court did so in *McClanahan*. In *McClanahan*, this Court analyzed the relevant treaties and statutes (read with the tradition of Indian sovereignty in mind) and concluded that "when Arizona's contentions are measured against these statutory imparities, they're simply untenable." However, the analytical basis for this conclusion is not set forth in that opinion.

D. **The Principle of Implied Governmental Immunity Is Not Applicable in Resolving Excise Tax Questions Involving Indian Commercial Activities With Non-Indians.**

Applicability of this doctrine was laid to rest by this Court in *Mescalero* wherein the opinion stated:

> "* * * The intergovernmental immunity doctrine was once much in vogue in a variety of contexts and, with respect to Indian affairs, was consistently held to bar a state tax on the lessees of or the product or income from restricted lands of tribes or individual Indians.

> The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in *Helvering v Mountain Producers Corp.*, 303 US 376, 82 L Ed 907, 58 S Ct 623 (1938); *Oklahoma Tax Comm'n v United States*, 319 US 598, 87 L Ed 1612, 63 S Ct 1284 (1943); and *Oklahoma Tax Comm'n v Texas Co.*, 336 US 342, 93 L Ed 721, 69 S Ct 561 (1949), where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law — automatically exempt from state taxation. Rather, the Court held that Congress has the power 'to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action' and that '[t]he question whether immunity shall be extended in situations like these is essentially legislative in character.' *Oklahoma Tax Comm'n v Texas Co.*, supra, at 365-366, 93 L Ed 721." (411 U.S. at 150)

Furthermore, *Mescalero* establishes that the exempt status of land does not exempt an Indian tribe from excise tax responsibilities on business activities conducted on the exempt land.

CONCLUSION

The question of whether Indians or Indian tribal organizations are subject to state excise taxes on business activities conducted with non-Indians on restricted or trust lands within the exterior boundaries of an Indian Reservation has not yet been resolved by the Supreme Court of the United States.

This issue must be examined in light of the relationship in the federal system between the states and the federal government. Counsel for the Indians take the position that absent express federal legislation, *McClanahan* precludes state taxation. It is submitted that this reading of *McClanahan* does not square with fundamental constitutional principles and is negated by those United States decisions which uphold state tax jurisdiction in the absence of federal legislation and specific statutes which exempt Indian land.

Constitutionally speaking, the federal government is one of delegated powers. This power includes power to make treaties with Indian tribes and regulate Indian commerce. In all other respects, residual power over Indians as citizens and residents of the states and over Indian lands as part of the territory of the states is lodged in the states. Thus, in order to exclude Indian lands from state jurisdiction on admission of the states to the Union, it was necessary for Congress to except these lands from state jurisdiction. In order to determine state jurisdiction, then, it is not necessary to find a grant of jurisdiction by Congress, but rather to find federal legislation appropriately exercised under Congress' Indian treaty and commerce powers which restrict jurisdiction. Tested against this constitutional framework, federal legislation and treaty provisions must preclude tax jurisdiction. In this context, *McClanahan* stands for the proposition that Arizona was denied jurisdiction over Navajo Indians by treaty or the

Arizona Enabling Act since no other federal legislation precluded its exercise.

To reconcile *Mescalero* with *McClanahan*, a valid "on-reservation" versus "off-reservation" distinction must be found. Where reservations are broken up by the general allotment and other allotment acts and Indians are commingled with the rest of the non-Indian community, it would appear that *Mescalero* and not *McClanahan* should control state excise tax questions.

Beyond this, we submit that the present Indian tax controversies stem solely from the fact that Indians have been assimilated into the society as a whole on equal footing and in competition with non-Indians. It is paradoxical to affirm Indian dependency and separateness in circumstances where Indians are carrying on commercial activities which are completely integrated with the non-Indian community.

For all these reasons, as well as those advanced in the Brief of the State of Montana, the State of Washington respectfully urges this Court to uphold the position of Montana and deny that any Indian immunity from state taxation exists in the circumstances of this case.

DATED this 19th day of November, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RICHARD H. HOLMQUIST, one of the attorneys for the State of Washington, as amicus curiae, certify that on the 19th day of November, 1975, I served copies of the foregoing BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE STATE OF MONTANA on appellants and appellees herein by mailing true copies thereof, first class air mail postage prepaid as follows:

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